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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 OLIVIA GARZA,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL
11 (PREVIOUSLY CAROLYN W.
COLVIN),
12 Acting Commissioner of Social
Security,¹

13 Defendant.

No. 1:16-CV-03082-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

14 Before the Court are the parties' cross-motions for summary judgment, ECF
15 Nos. 15 & 20. Plaintiff Olivia Garza brings this action seeking judicial review,
16 pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which
17 denied her applications for Disability Insurance Benefits and Supplemental
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20 ¹ Nancy A. Berryhill became the Acting Commissioner of Social Security on
January 20, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil
Procedure, Nancy A. Berryhill is substituted for Carolyn W. Colvin as the
defendant in this suit. No further action need be taken to continue this
suit. 42 U.S.C. § 405(g).

1 Security Income under Titles II & XVI of the Social Security Act, 42 U.S.C §§
2 401-434 & 1381-1383F. After reviewing the administrative record and briefs filed
3 by the parties, the Court is now fully informed. For the reasons set forth below, the
4 Court **GRANTS** Defendant's Motion for Summary Judgment.

5 **I. Jurisdiction**

6 Ms. Garza filed her applications for disability and disability insurance
7 benefits on October 24, 2012. AR 240-52. Her alleged onset date is August 1,
8 2009. AR 240. Her application was initially denied on December 13, 2012, AR
9 161-76, and on reconsideration on April 3, 2013, AR 180-92.

10 Administrative Law Judge ("ALJ") Larry Kennedy held a hearing on
11 September 25, 2014. AR 46-74. On October 24, 2014, the ALJ issued a decision
12 finding Ms. Garza ineligible for disability benefits. AR 19-40. The Appeals
13 Council denied Ms. Garza's request for review on March 31, 2016, AR 1-4,
14 making the ALJ's ruling the "final decision" of the Commissioner.

15 Ms. Garza timely filed the present action challenging the denial of benefits
16 on May 10, 2016. ECF No. 3. Accordingly, Ms. Garza's claims are properly before
17 this Court pursuant to 42 U.S.C. § 405(g).

18 **II. Sequential Evaluation Process**

19 The Social Security Act defines disability as the "inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or

1 mental impairment which can be expected to result in death or which has lasted or
2 can be expected to last for a continuous period of not less than twelve months.” 42
3 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
4 under a disability only if the claimant’s impairments are of such severity that the
5 claimant is not only unable to do his previous work, but cannot, considering
6 claimant's age, education, and work experience, engage in any other substantial
7 gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A) &
8 1382c(a)(3)(B).

9 The Commissioner has established a five-step sequential evaluation process
10 for determining whether a claimant is disabled within the meaning of the Social
11 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
12 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

13 Step one inquires whether the claimant is presently engaged in “substantial
14 gainful activity.” 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
15 activity is defined as significant physical or mental activities done or usually done
16 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
17 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
18 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

19 Step two asks whether the claimant has a severe impairment, or combination
20 of impairments, that significantly limits the claimant’s physical or mental ability to

1 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe
2 impairment is one that has lasted or is expected to last for at least twelve months,
3 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
4 416.908-09. If the claimant does not have a severe impairment, or combination of
5 impairments, the disability claim is denied, and no further evaluative steps are
6 required. Otherwise, the evaluation proceeds to the third step.

7 Step three involves a determination of whether any of the claimant's severe
8 impairments "meets or equals" one of the listed impairments acknowledged by the
9 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
10 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
11 20 C.F.R. § 404 Subpt. P. App. 1 ("the Listings"). If the impairment meets or
12 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
13 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
14 the fourth step.

15 Step four examines whether the claimant's residual functional capacity
16 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)
17 & 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant
18 is not entitled to disability benefits and the inquiry ends. *Id.*

19 Step five shifts the burden to the Commissioner to prove that the claimant is
20 able to perform other work in the national economy, taking into account the

1 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
2 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
3 burden, the Commissioner must establish that (1) the claimant is capable of
4 performing other work; and (2) such work exists in "significant numbers in the
5 national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
6 676 F.3d 1203, 1206 (9th Cir. 2012).

7 **III. Standard of Review**

8 A district court's review of a final decision of the Commissioner is governed
9 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
10 Commissioner's decision will be disturbed "only if it is not supported by
11 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1144,
12 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than
13 a mere scintilla but less than a preponderance; it is such relevant evidence as a
14 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*
15 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
16 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
17 whether the Commissioner's findings are supported by substantial evidence, "a
18 reviewing court must consider the entire record as a whole and may not affirm
19 simply by isolating a specific quantum of supporting evidence." *Robbins v. Soc.*

1 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
2 F.2d 498, 501 (9th Cir. 1989)).

3 In reviewing a denial of benefits, a district court may not substitute its
4 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
5 1992). If the evidence in the record “is susceptible to more than one rational
6 interpretation, [the court] must uphold the ALJ's findings if they are supported by
7 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
8 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
9 2002) (if the “evidence is susceptible to more than one rational interpretation, one
10 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
11 a district court “may not reverse an ALJ's decision on account of an error that is
12 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
13 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
14 The burden of showing that an error is harmful generally falls upon the party
15 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

16 **IV. Statement of Facts**

17 The facts of the case are set forth in detail in the transcript of proceedings,
18 and accordingly, are only briefly summarized here. Ms. Garza was born in 1991.
19 AR 38. While she does have a high school education, she required special
20 education classes and an additional two years to graduate. ECF No. 15 at 6. She

1 has very limited prior work experience that does not rise to legal definition of past
2 relevant work. *Id.* Ms. Garza has multiple mental impairments, as well as history
3 of learning disabilities. AR 22.

4 **V. The ALJ's Findings**

5 The ALJ determined that Ms. Garza was not under a disability within the
6 meaning of the Act from August 1, 2009, through the date of the decision. AR 19-
7 40.

8 **At step one**, the ALJ found that Ms. Garza had not engaged in substantial
9 gainful activity since August 1, 2009, her alleged onset date (citing 20 C.F.R. §§
10 404.1571 *et seq.* and 416.971 *et seq.*). AR 21.

11 **At step two**, the ALJ found Ms. Garza had the following severe
12 impairments: borderline intellectual functioning; attention deficit/hyperactivity
13 disorder (“ADHD”) versus hyperkinetic disorder; depressive disorder not
14 otherwise specified; intermittent explosive disorder; anxiety disorder not otherwise
15 specified; personality disorder not otherwise specified; and substance use disorder
16 (citing 20 C.F.R. §§ 404.1520(c) and 416.920(c)). AR 22.

17 **At step three**, the ALJ found that Ms. Garza did not have an impairment or
18 combination of impairments that meets or medically equals the severity of one of
19 the listed impairments in 20 C.F.R. §§ 404, Subpt. P, App. 1. AR 23-27.

1 At **step four**, the ALJ found Ms. Garza had the following residual functional
2 capacity: She can perform a full range of work at all exertional levels, but with the
3 following nonexertional limitations: She should avoid concentrated exposure to
4 fumes, odors, gases, dust, or poor ventilation. She can perform simple and routine
5 tasks and can follow short and simple instructions. She can do work that needs
6 little or no judgment and can perform simple duties that can be learned on the job
7 in a short period. She requires a work environment with minimal supervisor
8 contact. She can work in proximity to co-workers but not in a cooperative or team
9 effort. She requires a work environment with no more than superficial interactions
10 with co-workers. She requires a work environment that is predictable and with few
11 work setting changes (i.e. a few routine and uninvolved tasks according to set
12 procedures, sequence, or pace with little opportunity for diversion or interruption).
13 She cannot deal with the general public as in a sales position or where the general
14 public is frequently encountered as an essential element of the work process.
15 Incidental contact of a superficial nature with the general public is not precluded.
16 AR 27-38.

17 The ALJ determined that Ms. Garza has no past relevant work, so
18 transferability of job skills is not an issue. AR 38.

19 At **step five**, the ALJ found that in light of her age, education, work
20 experience, and residual functional capacity, there are jobs that exist in significant

1 numbers in the national economy that Ms. Garza can perform. AR 38-39. These
2 include industrial cleaner, laundry worker, and kitchen helper. *Id.* The ALJ
3 consulted a vocational expert and the Dictionary of Occupational Titles in making
4 this determination. *Id.*

5 **VI. Issues for Review**

6 Ms. Garza argues that the Commissioner's decision is not free of legal error
7 and not supported by substantial evidence. Specifically, she argues the ALJ erred
8 by: (1) finding that Ms. Garza's borderline intellectual functioning does not meet
9 the severity of Listing 12.05C; (2) failing to properly evaluate the medical opinion
10 evidence; (3) discrediting Ms. Garza's symptom testimony without providing
11 specific, clear, and convincing reasons for so doing. ECF No. 15 at 1.

12 **VII. Discussion**

13 **A. The ALJ did not err in the finding that Ms. Garza's borderline** 14 **intellectual functioning does not meet the severity of Listing 12.05C**

15 A claimant will satisfy Listing 12.05C and demonstrate intellectual
16 disability, thus ending the five-step inquiry at step three, if the claimant can show:
17 "(1) subaverage intellectual functioning with deficits in adaptive functioning
18 initially manifested before age 22; (2) a valid IQ score of 60 to 70; and (3) a
19 physical or other mental impairment imposing an additional and significant work-
20 related limitation." *Kennedy v. Colvin*, 738 F.3d 1172, 1174 (9th Cir. 2013). The

1 ALJ found that Ms. Garza did not meet Listing 12.05C because she did not have
2 deficits in adaptive functioning that initially manifested prior to age 22, nor a valid
3 IQ score of 60 to 70. AR 24-28. Ms. Garza argues this was in error.

4 **1. Deficits in adaptive functioning**

5 The ALJ specifically found that there was “no evidence that the claimant has
6 deficits in adaptive functioning.” AR 27. The primary reasons for the ALJ’s
7 finding were Ms. Garza’s ability to graduate high school, no findings of deficits in
8 adaptive functioning during in mental status examinations, and the breadth of Ms.
9 Garza’s activities. AR 25-28.

10 While Ms. Garza did take additional time to graduate from high school and
11 attended special education courses, the record supports the ALJ’s findings that her
12 behavioral and mental issues were a significant factor, and not intellectual ability
13 alone. AR 28, 277. Her school records reflect that Ms. Garza did “not have a
14 history of regular school attendance through out [sic] her school career.” AR 277.
15 She also had a very significant record of behavioral problems, including weapons,
16 insubordination, violence, and other aggressive conduct. AR 278.

17 In particular, effort and self-reliance is a theme found throughout Ms.
18 Garza’s record. A special education evaluation report from January 2012 observed
19 that Ms. Garza is a “good student, despite his [sic] inattentiveness and off-task
20 behaviors” and that she “has the ability to performed [sic] the tasks asked of her in

1 class, but that she lacks the effort and independence to complete things and turn
2 them in.” AR 309-10. In addition, the report stated that there were no concerns
3 regarding Ms. Garza’s adaptive community living skills. AR 311.

4 The ALJ also referred to multiple normal mental status examinations.
5 Examples in the record include January 2011, (AR 506), February 2011 (AR 545),
6 April 2013 (AR 460-61), and September 2013 (AR 492).

7 Finally, Ms. Garza’s activities do not support deficits in adaptive function.
8 She participated in a summer work program in 2009 unloading shipments at a retail
9 store, and by her own admission, she “did okay” at the job and got along well with
10 others. AR 458. In addition, she babysits periodically and worked for a period as a
11 security guard. AR 489, 660. Ms. Garza has also stated that she has regularly
12 looked for other work, including through an agency. *Id.* Moreover, her
13 socialization skills do not appear limited, as the record and her testimony at the
14 hearing refer to regular time spent with friends. AR 54-55, 61-63, 458, 489. She
15 also has the ability to comfortably socialize in public settings, including a hookah
16 lounge, a fair, concerts, and church. AR 61-63, 461, 595. Finally, Ms. Garza is able
17 to handle household chores and maintain concentration while reading or watching
18 television for at least two hours. AR 461.

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1 **2. Valid IQ score between 60 and 70**

2 The record contains multiple instances of psychometric testing, but the ALJ
3 found only the 1999 administration of the Weschler Intelligence Scale for
4 Children-III (“WISC-III”) to be reliable. AR 26. The results of the 1999 WISC-III
5 testing found Ms. Garza to have a full scale IQ of 76, performance IQ of 75, and
6 verbal IQ of 81. AR 278. These scores would not meet Listing 12.05C. *See*
7 *Kennedy*, 738 F.3d at 1174. Both her January 2012 and January 2015 special
8 education evaluation reports indicated that intellectual re-testing was not necessary
9 because Ms. Garza’s cognitive levels had not changed since the administration of
10 the WISC-III in 1999 and still fell within the borderline range. AR 278, 310-311.

11 Dr. Jay M. Toews, EdD, administered the Weschler Adult Intelligence
12 Scale-IV (“WAIS-IV”) on December 21, 2010. AR 506-07. At that time, Ms.
13 Garza tested to have a full scale IQ of 68. AR *Id.* Dr. Toews specifically found the
14 test results to be considered valid and further stated in his report that Ms. Garza
15 was “focused, attentive, and calm” during her evaluation and was “serious and
16 motivated for testing.” AR 506.

17 In discrediting these results, the ALJ noted significant discrepancies between
18 various scores, such as a fifteen-point difference between verbal comprehension
19 and perceptual reasoning. AR 26. In his report, however, Dr. Toews stated that
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1 the magnitude of the difference could suggest a cerebral disorder affecting the right
2 hemisphere of the brain. AR 507.

3 In sum, there is nothing to conclude that this result is invalid. Thus, the
4 Court notes the presence of at least one valid full-scale IQ result in the range of 60-
5 70 and need not address whether the April 2013 results were valid. However, to
6 meet Listing 12.05C, Ms. Garza must demonstrate both a valid IQ score in the 60-
7 70 range *and* deficits in adaptive functioning. *See Kennedy*, 738 F.3d at 1174. For
8 the reasons discussed above, the Court finds no error with the ALJ's conclusion
9 that Ms. Garza has no deficit in adaptive functioning. *See supra* p. 10-12. Thus, the
10 ALJ's error in not crediting the results of the December 2010 WAIS-IV test is
11 harmless error. *See Molina*, 674 F.3d at 1111.

12 **B. The ALJ did not err in evaluation of the medical record**

13 **1. Legal Standard**

14 The Ninth Circuit has distinguished between three classes of medical
15 providers in defining the weight to be given to their opinions: (1) treating
16 providers, those who actually treat the claimant; (2) examining providers, those
17 who examine but do not treat the claimant; and (3) non-examining providers, those
18 who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th
19 Cir. 1996) (as amended).

1 A treating provider's opinion is given the most weight, followed by an
2 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
3 absence of a contrary opinion, a treating or examining provider's opinion may not
4 be rejected unless "clear and convincing" reasons are provided. *Id.* at 830. If a
5 treating or examining provider's opinion is contradicted, it may only be discounted
6 for "specific and legitimate reasons that are supported by substantial evidence in
7 the record." *Id.* at 830-31.

8 The ALJ may meet the specific and legitimate standard by "setting out a
9 detailed and thorough summary of the facts and conflicting clinical evidence,
10 stating [his or her] interpretation thereof, and making findings." *Magallanes v.*
11 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When
12 rejecting a treating provider's opinion on a psychological impairment, the ALJ
13 must offer more than his or her own conclusions and explain why he or she, as
14 opposed to the provider, is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
15 Cir. 1988).

16 **2. The opinion of Dr. Toews**

17 Dr. Toews performed a psychological evaluation on Ms. Garza on January
18 18, 2011. AR 504-09. During the evaluation, Dr. Toews completed a mental status
19 examination and administered multiple objective tests. AR 506-08. Among his
20 impressions following the evaluation, Dr. Toews opined that Ms. Garza has

1 “significant cognitive processing deficits” that would limit her ability to adapt to
2 workplace stressors and other challenges and found her to have “severe problems”
3 when dealing with the general public. AR 508.

4 The ALJ gave Dr. Toews’s opinion “some weight.” AR 33. The ALJ found
5 that the limitations in social interaction and performance of tasks discussed by Dr.
6 Toews were consistent with the record, but the record also showed that Ms. Garza
7 can adapt to routine stressors adequately and that she can tolerate at least
8 superficial public contact. *Id.*

9 An ALJ may reject an opinion that is contradicted by a claimant’s activities
10 of daily living. *See Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). The
11 ALJ cited to many of Ms. Garza’s activities to demonstrate that she is less limited
12 than Dr. Toews opined. These included her ability to shop independently, attend
13 regular church services and sing in the church choir, participate in competitive
14 dancing, maintain steady friendships, and get along with others at her summer
15 work program. AR 33, 458, 505-06, 595. The record also demonstrates many
16 instances of socialization that were discussed previously in the analysis of Ms.
17 Garza’s lack of deficits in adaptive functioning. *See supra* pp. 10-12.

18 The Court finds the ALJ provided a detailed analysis, citing to specific,
19 clear, and convincing reasons, for rejecting the portion of Dr. Toews’s opinion that
20 was not supported by the record.

3. The opinion of Dr. Wachsmuth

Dr. Wendi Wachsmuth, PhD, performed a psychological evaluation on Ms. Garza on September 21, 2013. AR 489-92. Dr. Wachsmuth opined that Ms. Garza had marked limitations in five functional areas, including the ability to follow both short, simple and detailed, complex instructions, the ability to perform activities within a schedule, the ability to learn new tasks, and the ability to set goals and plan independently. AR 491. The ALJ gave little weight to Dr. Wachsmuth's opinion because there was no explicit basis for the findings and because the record, including Ms. Garza's statements to Dr. Wachsmuth, are inconsistent with the limitations opined. AR 37.

An ALJ may not discredit a doctor's opinion simply because it is in a check-box format unless the opinion is inconsistent with the underlying medical records. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). A check-box will generally be given more weight when it reflects a significant treatment relationship. *See id.* at 1013 (finding that the check-box form was based on significant experience with the claimant and numerous medical records).

Here, there are many factors that support the ALJ's determination. There is no lengthy established treatment history between Ms. Garza and Dr. Wachsmuth. The records strongly suggests this was their only meeting. *See* AR 489-93. Further, the record as a whole does not support Dr. Wachsmuth's assessments, nor do her

1 own notes. *Id.* Ms. Garza herself stated to Dr. Wachsmuth that she “could probably
2 handle full time work” and that she babysat. AR 489-91. While there were some
3 issues with fidgeting and other symptoms consistent with ADHD, largely the
4 mental status examination yielded benign results. AR 492-93. These facts are
5 inconsistent with the level of impairment opined by Dr. Wachsmuth, and a conflict
6 between a doctor’s notes and their subsequent opinion is an adequate reason for
7 discrediting the opinion. *See Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.
8 2014). Additionally, there is no indication in Dr. Wachsmuth’s notes that Ms.
9 Garza was taking her prescribed ADHD medication, which Dr. Wachsmuth
10 recognized would strongly benefit her. AR 491. Viewing the record as a whole,
11 with specific attention to Dr. Wachsmuth’s report, the Court does not find the ALJ
12 erred.

13 **4. The opinion of Dr. Barnard**

14 Dr. Philip G. Barnard, PhD, evaluated Ms. Garza on April 24, 2014. AR
15 660-664. The only clinical finding provided was that Ms. Garza’s ADHD would
16 affect her ability to work on a daily basis to a mild extent. AR 661. Nevertheless,
17 Dr. Barnard opined Ms. Garza would have moderate limitations understanding,
18 remembering, and persisting in detailed tasks; performing within a schedule,
19 including maintaining regular attendance and punctuality; completing a normal
20

1 work day and work week; and maintaining appropriate behavior in a work setting.
2 AR 662.

3 The ALJ actually agreed with some of these limitations, such as those
4 related to detailed instructions and extended public contact in a work setting. AR
5 37. The ALJ, however, only gave some weight to portions of the opinion, noting
6 that the record overall indicates Ms. Garza can maintain appropriate behavior and
7 persist in simple tasks without interruption. *Id.*

8 Again, the ALJ took issue with the lack of explanation for the check-box
9 format. Like Dr. Wachsmuth, Dr. Barnard has no established lengthy history with
10 Ms. Garza that would suggest the unsupported check-boxes are especially reliable.
11 *See supra* p. 17; *see also Garrison*, 759 F.3d at 1014. This is particularly relevant
12 for another reason the ALJ gave for giving only partial weight to Dr. Barnard's
13 opinion: Dr. Barnard's lack of familiarity with Ms. Garza's record. AR 37. The
14 ALJ specifically noted that Dr. Barnard was "critically misinformed about [Ms.
15 Garza's] substance abuse." *Id.* The ALJ explained that an opinion that does not
16 account for all relevant information is less reliable. *Id.* at fn.5.

17 Ms. Garza's statements about her substance use are inconsistent throughout
18 the record, as discussed later in the review of the ALJ's credibility analysis. *See*
19 *infra* pp. 25. In this instance, she told Dr. Barnard that she has never had a problem
20 with alcohol, nor has she used illicit drugs other than marijuana. AR 660. These

1 statements are inconsistent with others in the record, most notably her statements
2 on April 7, 2014, that she drinks until she is unable to drink anymore during the
3 weekends and combines “molly” (methylenedioxy-methamphetamine) and alcohol.
4 AR 684. These admissions resulted in a diagnosis of alcohol dependence and a
5 referral to treatment—only *seventeen days* before she met with Dr. Barnard and
6 told him that she had no problem with alcohol. AR 685. Even though the ALJ
7 ultimately found her substance use disorder did not materially affect her ability to
8 perform gainful activity, AR 32, this shows a serious hole in Dr. Barnard’s
9 knowledge of his patient. It was not unreasonable for the ALJ to approach the
10 opinion with caution.

11 In addition, Dr. Barnard’s notes largely reflect subjective and biographical
12 information by Ms. Garza, who was properly found to be unreliable. *See infra* at
13 pp. 23-25. The objective information contained within Dr. Barnard’s notes is
14 limited to the mental status examination, which does not support all of the
15 limitations opined. ALJ. AR 663-64.

16 In sum, the Court finds no error in the ALJ’s decision to give weight only to
17 the portions of Dr. Barnard’s opinion that were consistent with the record and not
18 based upon subjective information.

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1 **5. The opinion of Dr. Jackson**

2 Dr. Caryn Jackson, MD, was a treating physician with Yakima
3 Neighborhood Health Services, who provided statements on August 5, 2013, and
4 July 31, 2014, that Ms. Garza’s mental health disorder prevented her from
5 engaging in work or school activities. AR 477, 698.

6 The ALJ gave little weight to these statements, which he correctly described
7 as “cursory.” AR 35-36. Dr. Jackson’s statements provided no specific findings or
8 explanations to justify the opinion, and she did not even refer to a specific mental
9 health condition. AR 477, 698. An ALJ may reject a treating physician’s opinion
10 that is conclusory, brief, and unsupported by the record as a whole or by objective
11 medical findings. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). In
12 this case, the opinion is not only conclusory and brief, but also unsupported by
13 objective medical findings or the record as a whole. Further, they provide no
14 relevant information that can be considered to assess the residual functional
15 capacity and ultimate disability determination. *See Meanel v. Apfel*, 172 F.3d 1111,
16 1114 (9th Cir. 1999) (rejection of conclusory, unsubstantiated opinion in favor of
17 specific findings that were useful in determining disability).

18 The records from Dr. Jackson do not contain objective findings that support
19 the total limitations opined. For example, while a physical examination was
20 performed in November 2012, there was no specific information about Ms. Garza’s

1 psychological condition other than a comment that Ms. Garza showed “some
2 improvement” after restarting her ADHD medication. AR 422. There were also
3 some statements that appear to be based on subjective information provided by Ms.
4 Garza, who has been established to be unreliable. *See infra* at pp. 23-25. Likewise,
5 at an August 13, 2013, appointment, Dr. Jackson’s notes do not demonstrate
6 objective medical findings that support a total bar on work and school activities.
7 AR 604.

8 Moreover, the record generally does not support Dr. Jackson’s August 2013
9 and July 2014 opinions. Ms. Garza was able to attend and graduate from high
10 school. AR 277-309. While she did attend special education courses and required
11 additional time, she was clearly able to participate in school activities, despite Dr.
12 Jackson’s statements to the contrary. Additionally, the record shows instances of
13 work experience, such as babysitting, work as a security guard, and a temporary
14 job in retail. AR 458, 489, 660. These activities are all contrary to Dr. Jackson’s
15 total bar on work and school activities, and the ALJ was reasonable to consider
16 them when choosing to discredit the opinion.

17 **6. The opinions of Dr. Borton**

18 Dr. Richard Borton, PhD, performed a review of the record for the state on
19 December 11, 2012. AR 116-23. Dr. Borton opined that Ms. Garza would have
20 problems adapting to changes on the job and that she could only adapt to minimal

1 changes in a “very routine set of job tasks.” AR 123. He did also recognize that
2 when taking her medication, her impulse control, the source of her adaptation
3 problems, improved. *Id.*

4 Dr. Jerry Gardner, PhD, reviewed the record and provided an opinion for the
5 state on April 3, 2013. AR 139-49. His findings were similar to Dr. Borton in that
6 he found Ms. Garza to have low tolerance for stress and limited adaptive coping
7 strategies. *Id.*

8 As with Dr. Barnard, the ALJ gave some weight to the portions of the
9 opinions that were supported by the record, but he rejected the portions
10 contradicted. AR 35. For example, the ALJ pointed to a special education
11 evaluation performed January 29, 2012. AR 35, 309-14. This evaluation found Ms.
12 Garza to have no concerns regarding adaptive community living skills, and that
13 despite not being medicated for approximately one year, she could still persist with
14 short, concise instructions. AR 309-11.

15 The record overall demonstrates that Ms. Garza will function best when she
16 takes her ADHD medication, but also that she has some adaptive capability even
17 without her medication. The Court finds no error in the ALJ’s explanation for the
18 decision to give less credit to the portion of Drs. Borton and Gardner’s opinion that
19 contradicted the special education evaluation and the record generally.

20 //

1 **C. The ALJ did not err in the determination of Ms. Garza’s credibility.**

2 An ALJ engages in a two-step analysis to determine whether a claimant’s
3 testimony regarding subjective symptoms is credible. *Tommasetti*, 533 F.3d at
4 1039. First, the claimant must produce objective medical evidence of an underlying
5 impairment or impairments that could reasonably be expected to produce some
6 degree of the symptoms alleged. *Id.* Second, if the claimant meets this threshold,
7 and there is no affirmative evidence suggesting malingering, “the ALJ can reject
8 the claimant’s testimony about the severity of [his] symptoms only by offering
9 specific, clear, and convincing reasons for doing so.” *Id.*

10 In weighing a claimant's credibility, the ALJ may consider many factors,
11 including, “(1) ordinary techniques of credibility evaluation, such as the claimant's
12 reputation for lying, prior inconsistent statements concerning the symptoms, and
13 other testimony by the claimant that appears less than candid; (2) unexplained or
14 inadequately explained failure to seek treatment or to follow a prescribed course of
15 treatment; and (3) the claimant's daily activities.” *Smolen v. Chater*, 80 F.3d 1273,
16 1284 (9th Cir. 1996).

17 The record strongly supports the ALJ’s contention that Ms. Garza’s
18 conditions can be managed by medication. Unexplained or inadequately explained
19 failure to follow a prescribed course of treatment can be a proper basis for an ALJ
20 to discount a claimant’s credibility. *Smolen*, 80 F.3d at 1284. In April 2011, Dr.

1 Jack Reiter, MD, provided a letter to Ms. Garza which indicated that Ms. Garza
2 herself recognized improvement while on her ADHD medication and that her
3 performance in school and other activities will be “markedly improved.” AR 385.
4 Ms. Garza’s overall mood and behavior were noticeably worse during evaluations
5 in which she had not been regularly taking her medication. AR 386-90. For
6 instance, her special education evaluators noted that she would lose focus without
7 short, concise instructions, and this was during a period in which she was not
8 taking her medication. AR 309-310. The record is unclear why Ms. Garza
9 sometimes took her ADHD medications and at other times did not, particularly
10 since she herself recognized improvement from it.

11 In addition, Ms. Garza’s activities and work history also do not support her
12 subjective testimony. Ms. Garza has prior experience working in a retail store
13 without problems doing the job or getting along with her co-workers. AR 458. She
14 periodically babysits and had worked as a security guard. AR 489, 660. Her social
15 skills are well-developed, including the ability to socialize comfortably in public
16 settings such as a hookah lounge, a fair, concerts, and church. AR 61-63, 461, 595.
17 She is also able to complete household chores and maintain concentration while
18 reading or watching television for at least two hours. AR 461. All of these
19 activities do not support her allegations, and it was not improper for the ALJ to
20 consider them.

1 Finally, Ms. Garza has exhibited significant inconsistency when discussing
2 her history of drug and alcohol use, which was an important factor to the ALJ's
3 analysis. Prior inconsistent statements and other testimony that appears less than
4 candid will uphold an ALJ's finding on credibility. *Smolen*, 80 F.3d at 1284.
5 Almost each evaluation contains different information about Ms. Garza's drug and
6 alcohol use. Her medical record of January 11, 2013, noted a history of marijuana
7 use, AR 626, but on April 1, 2013, she denied any history of drug or alcohol use,
8 AR 458. She admitted to drinking heavily at the hookah lounge, but claims to have
9 stopped by her visit on September 6, 2013, with Mark Sikora, LICSW. AR 595.
10 Also in September 2013, she told Dr. Wachsmuth that she "experimented" with
11 marijuana and pills as recently as a couple weeks prior and drinks
12 "occasionally." AR 492. As discussed previously in the analysis of Dr. Barnard's
13 opinion, this is dramatically different from the information provided to Dr. Barnard
14 in April 2014, in which she claims to have never had an alcohol problem or used
15 any drugs other than marijuana. AR 660; *See also supra* at p.19. In sum, Ms.
16 Garza's own statements about her drug and alcohol abuse have changed with each
17 evaluation, and the significant inconsistency between her statements, particularly
18 within short time frames, constitute valid reasons for the ALJ to have rejected her
19 credibility.

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1 **VIII. Conclusion**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is supported by substantial evidence and free from legal error.

4 Accordingly, **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
7 **GRANTED**.

8 3. The District Court Executive is directed to enter judgment in favor of
9 Defendant and against Plaintiff.

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
11 Order, forward copies to counsel and **close the file**.

12 **DATED** this 1st day of June, 2017.

13 *s/Robert H. Whaley*
14 **ROBERT H. WHALEY**
15 Senior United States District Judge
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